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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MIDWEST COMMUNICATIONS, INC.,
Petitioner,

vs.

MINNESOTA TWINS, INC.; NORTHSTAR HOCKEY PARTNERSHIP; TWINSTAR ENTERPRISES, a General Partnership; MINNESOTA SUBSCRIPTION TELEVISION, INC., D/B/A SPECTRUM; AND SPORTS CHANNEL, a Minnesota Joint Venture
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT BRIEF FOR RESPONDENTS IN OPPOSITION

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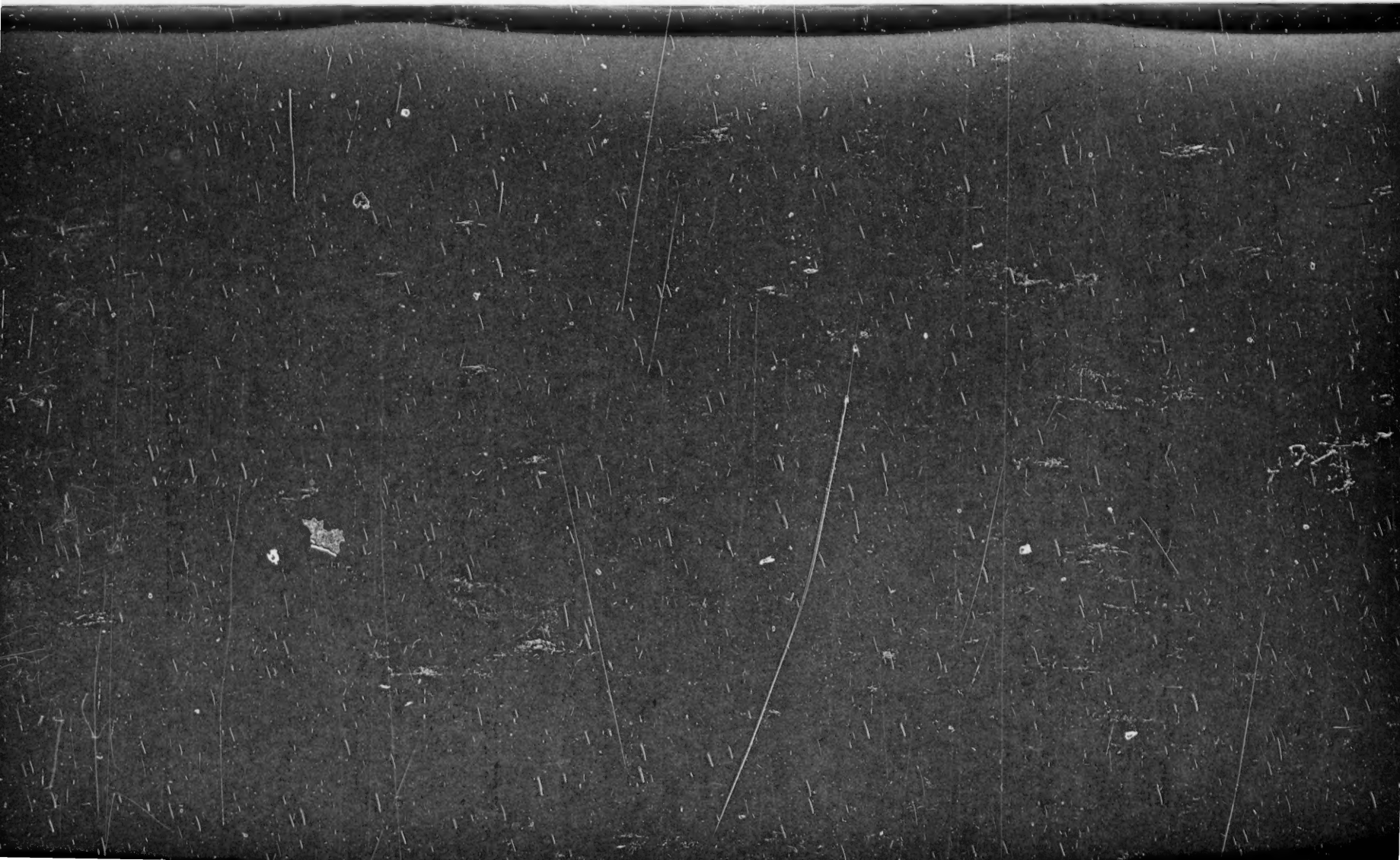

QUESTIONS PRESENTED

1. Whether a plaintiff must demonstrate "antitrust injury" as defined in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), to have antitrust standing for injunctive relief?

2. Assuming a plaintiff must demonstrate "antitrust injury" to have antitrust standing for injunctive relief, whether petitioner has antitrust standing even though the sole cause of its loss was because another buyer outbid petitioner for the products at issue (or because petitioner decided not to bid more)?

3. Whether a potential purchaser has antitrust standing for damages relief based on a tying claim even though it made no purchase because another party actually bought the unique products?[1]

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[1]Pursuant to Supreme Court Rule 28.1, respondent Minnesota Twins, Inc. states that it has no parent company or subsidiaries (excluding wholly owned subsidiaries). Respondent Northstar Hockey Partnership states that it is a partnership consisting of Northstar Financial Corporation, Northstar Met Center Management Corp., GBLSC, Inc., GBLSC West, Inc. Respondent Minnesota Subscription Television, Inc. states that its parent companies are United Cable Television, Inc., Buford Television, Inc., and HEN, Inc; it has no subsidiaries (excluding wholly owned subsidiaries).

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Respondents Minnesota Twins, Inc. ("Twins"), Northstar Hockey Partnership ("North Stars"), Twinstar Enterprises ("Twinstar") and Minnesota Subscription Television, Inc. d/b/a Spectrum ("Spectrum"), respectfully request that this Court deny the petition for writ of certiorari filed by petitioner Midwest Communications, Inc. ("WCCO") seeking review of the decision of the Eighth Circuit Court of

Appeals in this case. In the interest of brevity, respondents are submitting this joint brief in opposition to the petition for writ of certiorari.

STATEMENT OF THE CASE

The fact framework in petitioner's statement of the case is incomplete. The facts are fully set forth in the Court of Appeals Opinion. Pet. App. A-2 - A-10. Respondents submit the following specific facts that relate to the issues raised by the petition.

This case is a textbook example of a loser in a bidding contest seeking to obtain through litigation what it failed to achieve in the marketplace. Petitioner WCCO owns the Twin Cities CBS TV affiliate, a CBS affiliate AM radio station that holds the largest market share in the Twin Cities, and a satellite and cable TV company serving Minnesota and the four surrounding states.

WCCO describes itself as "the Upper Midwest's preeminent and most successful broadcaster." District Court Memorandum and Order, January 19, 1983, Resp. App. A-3. It has long featured sports programming as a mainstay of its entertainment, especially on its radio station which has broadcast Twins games for over twenty years, and continues to broadcast them to this day.

Respondent Twins operates the Minnesota Twins major league professional baseball team that plays its home games at the Hubert H. Humphrey Metrodome in Minneapolis, Minnesota in a season from April to October. Northstar Hockey Partnership and its affiliates operate the Minnesota North Stars, a major league professional hockey team that plays its home games at the Met Center in Bloomington, Minnesota (a suburb of Minneapolis) in a season from October to April. Pet. App. A-6.

In 1981 the Twins and North Stars, following a national pattern in professional sports, began discussing the possibility of offering a local year-round sports channel featuring hockey and baseball. Pet. App. A-7. Traditionally, away games had been broadcast on over-the-air ("OTA") or free TV. The hope, however, was to form a joint venture to broadcast home games on pay TV and thereby expand the arena without hurting attendance. The teams stood to gain by increasing their revenues and fans stood to gain by having more opportunities to view sports entertainment.

The teams offered a year-round sports programming opportunity to pay TV suppliers in the Twin Cities and the surrounding five-state region. A bidding process began in the spring of 1982. Pet. App. A-7. One bid the teams received was from Spectrum, a pay TV supplier new to the Twin Cities market, Resp. App. A-3, that proposed to sell both Twins and North Stars' games at retail prices to Twin Cities residents and at wholesale prices to cable TV operators. The proposal left the teams free to sell their regional rights to one or more cable TV operators, including WCCO.

WCCO then submitted a bid for pay TV rights to both teams. Pet. App. A-8. The proposal, which is not mentioned in the petition, envisioned a three-way equity partnership with WCCO, the Twins, and the North Stars. The teams compared the two proposals and informed WCCO that they found its offer inferior to the Spectrum offer. The teams even told WCCO how to increase its offer to match Spectrum's. Resp. App. A-4. Importantly, the Court of Appeals noted that "WCCO refused to alter substantially its original proposal." Pet. App. A-8.

Instead, WCCO surreptitiously purchased a purported

assignment of a right of first refusal for the Twins' pay TV rights that the Twins had given to Midwest Federal, a Minneapolis savings and loan association, as part of its 1980 OTA broadcasting contract. WCCO submitted its second bid, this time for the Twins' rights alone. "The Twins rejected the Midwest Federal/WCCO offer and assigned their telecast rights to Twinstar, which then formally accepted Spectrum's offer." Pet. App. A-9. Twinstar then formed a joint venture with Spectrum, which was named Sports Channel, to broadcast home games of the Twins and North Stars. These events occurred shortly after the 1982-83 hockey season had begun and Sports Channel immediately began pay telecasting of North Stars home games within the Twin Cities.

Within weeks of the start of Sports Channel programming WCCO commenced this antitrust action and immediately moved for a temporary restraining order to stop the competitive broadcasting. After the TRO was denied, WCCO moved for a preliminary injunction to bar telecast of Twins' games in the spring. Resp. App. A-1 - A-12. The District Court described WCCO as "one of this region's leading broadcasters," Resp. App. A-7, and denied the motion stating:

> Since Spectrum has obtained but a toehold in the broadcasting market of this region, this Court finds the possible demise of Spectrum and the enhanced entrenchment of WCCO to be of legitimate concern and therefore, at this time, refuses to turn back WCCO's competition.

Resp. App. A-11. After the trial in June through August, 1983, the District Court entered judgment dismissing all of WCCO's claims except its tying claims and enjoined the

teams from maintaining any combination with each other to market "the telecast rights for the games of one team on the condition that the telecast rights for the other team be acquired in whole or in part." Pet. App. A-6. WCCO immediately moved to expand the injunction, and, as the District Court's later order said, "to kick both teams off Spectrum and potentially [to] allow WCCO to take Spectrum's place in the broadcast market." Pet. App. A-41. The additional requested relief included dissolution of the teams' joint venture with Spectrum. 8th Circuit Appendix (hereafter "8th A") A-267, 279-282. WCCO's requested relief was denied. Pet. App. A-46.

In March, 1984, the District Court granted judgment notwithstanding the verdict on the tying claims. The District Court concluded that WCCO did not have antitrust standing, citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). Pet. App. A-37 - A-41. The District Court found that WCCO had both the desire and capability to enter the pay TV sports market but simply allowed itself to be outbid. Pet. App. A-39. A loss in a bidding contest, the District Court ruled, "is not the type [of harm] which Congress sought to rectify through the antitrust laws." *Id.*

The Court of Appeals affirmed the JNOV:

> WCCO did fail to gain the sports telecast rights it sought. But, as the district court concluded, this loss was likely regardless of whether [the teams] engaged in a tying arrangement. Spectrum simply was willing to pay the teams more for their telecast rights. The causal connection between the alleged antitrust violations and WCCO's asserted injury is tenuous at best. WCCO's loss stemmed from its failure to make the most satisfactory bid—a type of loss that always occurs when a transaction involves multiple bidders.

Pet. App. A-15. The Court of Appeals concluded that any threatened loss to WCCO flowed from its failure to prevail in the competitive bidding for the rights to the teams' games: "There is no actual or threatened injury to competition, and thus no antitrust injury." Pet. App. A-17.[2]

The petition states a fact not contained in the record that Spectrum ceased broadcasting pay TV sports in the fall of 1985. Pet. 11, 20. The petition uses this fact to argue that the teams are once again conspiring to sell their pay and other telecast rights in violation of the antitrust laws. Pet. 20.

It is true that Spectrum ceased operating in October, 1985, and stopped providing pay TV entertainment in the Twin Cities, including sports. WCCO, thus, has one less pay competitor. It is equally true, however, that since

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[2]The Court of Appeals did not reach the merits of WCCO's pooling and tying claims but nevertheless found the claims to be so curious from the standpoint of economic common sense and legitimate trade regulation interests that it devoted a section of its opinion to the merits. The Court of Appeals stated:

> However, we will comment on our perception of the lack of substance in WCCO's antitrust claims. We have not found in WCCO's allegations any claim of injury to competition in any defined, relevant, product or geographic market. Problems of market definition aside, the level of competition probably increased when Spectrum won its bid for local telecast rights to the Twins' and North Stars' games. Otherwise, if WCCO had prevailed on its initial bid, WCCO would have controlled the Twins' radio broadcast rights, both teams' metropolitan telecast rights, and the regional telecast rights. With Spectrum prevailing, WCCO retained the Twins' radio broadcast rights, Spectrum held the metropolitan telecast rights, and another entity could acquire the unassigned regional telecast rights.
>
> We also note in passing the enormous substantive problems with WCCO's tying claim. Chief among these is WCCO's failure to identify the tying product or the tied product. In light of that failure, we have difficulty seeing how the jury could have rationally assessed [the teams'] economic power in the tying product or the anticompetitive effect, if any, of the alleged unlawful tying arrangement in the market for the tied product. [citation omitted.] In short, we seriously doubt that WCCO made a sufficient tying case to warrant submission of this claim to the jury.

Pet. App. A-18 - 19.

October, 1985, WCCO has not made a proposal to purchase either team's pay TV rights. It is also true that commencing in 1984 the North Stars entered into a three-year contract with KITN, Inc., to broadcast certain away games on Twin Cities Channel 29, a non-network station. It is also true that commencing in 1985, the Twins entered into a four-year agreement with United Television, Inc., to broadcast games, mostly away games, on Twin Cities Channel 9, another non-network station. The so-called "conspiracy" is supporting active competition in the Twin Cities TV market.

Finally, WCCO failed in its petition to present the Court with an important fact concerning the appropriateness of discretionary review: this case has been settled for the most part with regard to the Twins. In 1984 the Twins were purchased by a new owner who solicited, and obtained, the agreement of WCCO not to pursue any action for damages against the Twins; only the issue of injunctive relief was held open. In 1985 the Twins, apparently forgetting that they were supposed to be conspiring against WCCO, signed a radio broadcast contract with WCCO which essentially confirmed the 1984 settlement. Even if an important federal question were present, which it is not, this case for the most part is moot and therefore not worthy of this Court's discretionary review.

REASONS FOR DENYING THE WRIT

To entice this Court to grant certiorari WCCO invokes the customary "conflict in the circuits" language. Pet. 10. Nowhere is the alleged conflict specified by stating which appellate court decisions conflict with each other. In fact, the appellate courts have consistently rejected WCCO's novel legal theories that *Brunswick* does not apply to

Section 16 claims, or, that proof of an antitrust violation automatically creates antitrust standing. This Court, for clear and correct policy reasons, has always limited antitrust tying plaintiffs to foreclosed competitors in the tied product market or actual purchasers of the tied product. WCCO's invitation to expand the class of damage claimants based on alleged antitrust tying violations to potential purchasers of the tied product should be rejected by this Court because of the inherent problems with duplicate recoveries and speculative damage theories.

In addition to the lack of a conflict in the circuits or a substantial federal question in this case, certiorari in general is not appropriate for several reasons. First, the lower court fact findings, express and implied, contradict the assumptions of the certiorari questions proposed by WCCO Second, severe defects in the antitrust claims of WCCO, Pet. App. A-19, independent of the lack of antitrust standing determination by the District Court and Court of Appeals, make this case atypical such that its general applicability to antitrust standing principles will be virtually worthless.

I.

THIS CASE DOES NOT PRESENT FACTS APPROPRIATE TO DETERMINE WHETHER *BRUNSWICK* ANTITRUST STANDING PRINCIPLES APPLY EQUALLY TO INJUNCTIVE RELIEF UNDER SECTION 16 OF THE CLAYTON ACT AS TO DAMAGES UNDER SECTION 4 OF THAT ACT.

1. WCCO cites the truism that injunctive relief against threatened injury may be available to an antitrust plaintiff not yet injured and not able to obtain damages. Pet. 12-13.

The question of threatened injury on either the pooling or tying claim is only germane, however, once it is determined that WCCO is a proper antitrust plaintiff. WCCO ignores the Court of Appeals conclusion that the injury WCCO claims, whether threatened or already suffered, "entails no threatened injury to competition," Pet. App. A-18, and thus does not confer antitrust standing. The lack of threatened antitrust injury, which is easier to prove than actual antitrust injury, precluded injunctive relief for WCCO.

2. While it is true that Section 16 standing can exist without Section 4 standing, this case does not present a fact scenario enabling the Court to distinguish between Section 4 and Section 16 standing. Although WCCO requested special verdict questions on actual injury in support of its Section 4 claims, it failed to request any special verdict questions on threatened injury to support its Section 16 claims. The District Court held, and the Court of Appeals affirmed, that WCCO's failure to request such a jury instruction was dispositive. Pet. App. A-18. The case WCCO would like this Court to decide, threatened injury despite the absence of actual antitrust injury, simply is not present in this case. Therefore, certiorari should be denied.

3. Acknowledging its trial blunder of failing to request a jury instruction on threatened injury, WCCO then argues that the District Court had the power to issue an injunction because Section 16 involves traditional principles of equity. Pet. 22-23. The argument simply makes matters worse for WCCO because the District Court *did* analyze the issue of threatened injury to WCCO, and concluded there was none. Pet. App. A-42 ("If the two clubs' pooling of re-

sources were to cause injury to WCCO, it would have manifested itself by now.").

Further, in the absence of a jury fact finding or District Court fact finding it is presumed on appeal that the District Court made whatever finding necessary to support the judgment entered. Fed. R. Civ. P. 49(a); *see also* 9 C. Wright & A. Miller, *Federal Practice and Procedure,* § 2507 at 505 (1971). Since the District Court entered judgment denying WCCO relief, there is an implied finding of fact that there was no threatened injury to WCCO.

4. Through a variety of theories, waiver of threatened injury question by WCCO, finding by District Court of no threatened injury, or implied finding of no threatened injury based on judgment entered, it is clear that the record of this case contains no determination of threatened injury of any kind. Absent any such record of any threatened injury, WCCO merely presents the Court with the abstract proposition that because Section 16 standing is easier to achieve than Section 4 standing relief must be granted. To address the first certiorari question raised by WCCO in its petition, whether *Brunswick* applies to Section 16 cases as well as Section 4 cases, the Court needs a case with a lower court record showing no actual antitrust injury, but a fact finding, by a jury or the trial court, of threatened injury. That is not the present case and therefore certiorari should be denied.

5. The basic argument asserted in WCCO's petition is that the Court of Appeals misinterpreted *Brunswick*. In comparing this case to *Brunswick,* the Court of Appeals said:

> The analogy to *Brunswick* is striking. In that case, the plaintiffs claimed that their profits would have increased if the defendant had not taken control of

> several bowling centers to prevent them from closing. Yet, as the Supreme Court noted, the same 'loss' would have occurred if another entity had acquired or refinanced the centers. As we do here, the Supreme Court concluded that the loss was not attributable to or caused by an antitrust violation. *Brunswick*, 429 U.S. at 487-88.

Pet. App. A-15. In response, WCCO tries to avoid the economic wisdom of the *Brunswick* rule by arguing: (a) *Brunswick* is a damages case; and (b) *Brunswick* dealt with Section 7 where an anti-competitive effect is merely probable, not proven. Neither purported distinction has merit.

The petitioner in *Brunswick* did not contest the respondents' standing to seek an injunction, 429 U.S. at 491, so this Court had no occasion to address the question of injunctive relief standing. Without exception, the lower courts, in one degree or another, have affirmed the common sense proposition that *Brunswick* analysis applies to injunctive relief cases. *E.g. Local Beauty Supply, Inc. v. Lamaur, Inc.*, 1986-1 Trade Cases (CCH) ¶ 67,040 (7th Cir. April 9, 1986) ("A plaintiff seeking equitable relief under § 16 of the Clayton Act should be no less representative of the interests of the antitrust 'victims' than those seeking damages under § 4."); *Ball Memorial Hospital, Inc. v. Mutual Hospital Ins., Inc.*, 784 F.2d 1325, 1334 (7th Cir. 1986); *Central National Bank v. Rainbolt*, 720 F.2d 1183, 1186 (10th Cir. 1983); *Schoenkopf v. Brown & Williamson Tobacco Corp.*, 637 F.2d 205, 210-211 (3rd Cir. 1980).[8]

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[8]WCCO erroneously alleges that the Fifth Circuit affirmed a District Court decision "holding that *Brunswick's* antitrust injury requirement does not apply to injunctive claims." Pet. 15. In *Tim W. Koerner & Assoc. v. Aspen Labs, Inc.*, 492 F.Supp. 294, 300 (S.D. Tex. 1980), *aff'd*, 683 F.2d 416 (5th Cir. 1982), the district court held that "the pivotal issue for standing under Section 16 is proximate cause . . . resulting from the antitrust violation." The district court said the "analysis of proximate cause under Section 4, as set forth above [citing *Brunswick*] is also applicable to Section 16." *Id.* at 301. The Fifth Circuit affirmed without opinion. Thus there is no "conflict in the circuits."

It makes no sense to suggest that a plaintiff may achieve injunctive relief under Section 16 when his threatened injury does not flow from that which makes the questioned acts unlawful under the antitrust laws. To adopt WCCO's view would divorce the remedy from the purpose of the underlying substantive statute.

The second distinction of *Brunswick* asserted by WCCO would rob *Brunswick* of its meaning. The point of antitrust standing is that not everyone is a proper person to challenge certain conduct. To suggest that proof of violation confers antitrust standing for any type of relief means that cases like *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), and *Brunswick*, where a violation was assumed, are meaningless. The argument, however, does point up the unsuitability of this case for plenary review; this Court should encourage early antitrust standing decisions, not after a two-month trial.[4]

6. WCCO erroneously suggests that certiorari should be granted here for the same reasons it was granted in *Monfort of Colorado, Inc. v. Cargill, Inc.*, 761 F.2d 570 (10th Cir. 1985), *cert. granted*, 106 S.Ct. 784 (1986) (No. 85-473). WCCO admits, however, that the *Monfort* case and this case involve different issues relating to antitrust injunctive relief. Pet. 16.

Monfort is an antitrust injunction claim by a competitor against a merger by two horizontal competitors in the same market. It is demonstrably dissimilar to the present case.

WCCO's tying claim here would not pass muster under

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[4]Since this case comes to the Court after a two-month trial it is atypical of most standing cases. Therefore, the case is not worthy of certiorari because of its lack of general application to other antitrust standing cases.

the injunctive relief standards stated in *Monfort*, whether they are right or wrong. The Court of Appeals in *Monfort* stated that:

> In [an antitrust injunction case] *Brunswick* mandates only an inquiry into the causal connection between the threatened injury and the putative antitrust violation. If a plaintiff surmounts this causal hurdle, it has standing to seek an injunction. . . The Supreme Court has said that this causation inquiry is like proximate cause analysis, *see Blue Shield*, 457 U.S. at 477, 102 S.Ct. at 2547; *Associated General Contractors*, 459 U.S. at 535-36, 103 S.Ct. at 907-08. To decide whether Monfort has antitrust standing, we now consider whether Excel's increased market power after acquisition of Spencer Beef would be a proximate cause of Monfort's threatened injury.

761 F.2d at 574. Thus, *Monfort* compels a proximate cause analysis. WCCO cannot demonstrate proximate causation between any antitrust violation and any loss to itself because the cause of that loss is Spectrum's decision to outbid WCCO (or WCCO's decision not to increase its own bid when it had the wherewithal to do so). The District Court so found, as did the Court of Appeals. Thus the *Monfort* court, despite granting plaintiff in its case a permanent injunction, would have decided this case precisely as the Court of Appeals did.

Monfort also involves horizontal competitors and squarely presents the question of whether a competitor may assert a Section 7 claim to bar a merger of two other competitors in the same market. WCCO is not a competitor of the Twins or North Stars; it is not a major league professional sports team located in the Twin Cities.

The *Monfort* petitioner (and the Government as *amicus)* argue that competitiors should not have antitrust standing to interfere with mergers because they are motivated to sue for anticompetitive reasons. Allowing standing in such circumstances, the argument continues, would turn the antitrust laws upside down and encourage those fearful of increased efficiency to protect an inefficient status quo though a court action.

That is precisely what happened in this case. WCCO, the self-described "pre-eminent and most successful broadcaster" in the Twin Cities, brought this action to drive a new competitor out of the sports broadcasting market.[5] This result was part of a marketing strategy that WCCO proudly admitted at trial: WCCO witnesses testified it wants *all* the local sports programming for its pay TV, OTA and radio services. 8th A. 887-888. The goal, the WCCO president testified at trial, was to take the rights to both teams, plus the rights to the University of Minnesota team sports, so there would not be any other sports product available for WCCO's competitiors. 8th A. 1152, 1158-59, 1161-62. This case is a classic example of a well-heeled, entrenched economic actor using a costly antitrust action to stop competition.

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[5]As indicated in WCCO's petition, the strategy has succeeded because Spectrum no longer broadcasts on pay TV home games of the Twins or North Stars. The real loser because of this litigation is, of course, the consumer because of the fewer choices available for sports programming. Having driven a competitor from the market with this litigation, WCCO has not renewed any of its old bids for Twins' and North Stars' pay TV rights, or, for Twins' pay TV rights alone.

II.

THE QUESTION OF WHETHER STANDING FOR INJUNCTIVE RELIEF UNDER SECTION 16 EXISTS IS NOT PRESENTED BY THE FACTS OF THIS CASE

1. WCCO next argues that "[E]ven assuming the applicability of some form of *Brunswick's* antitrust injury requirement, WCCO amply demonstrated the threatened injury required to establish standing for injunctive relief under Section 16 of the Clayton Act." Pet. at 18. The proposed certiorari question seeks to have this Court rule as a matter of law that a plaintiff proving an antitrust violation automatically has standing for an antitrust injunction under Section 16. Unfortunately, WCCO again disregards the lower court record in an attempt to generate a question suitable for this Court's review. To understand the shortcomings of WCCO's argument, it must be recognized that the pooling and tying claims of WCCO are distinct counts of the Complaint.

With regard to pooling, Count I of the Complaint, the jury expressly found that there was no actual injury to WCCO. Pet. App. A-48 (Special Verdict Question No. 5: "Was WCCO injured in its business or property by the unreasonable restraint of trade? Answer: No."). Injury to business or property is an essential element of an antitrust claim. 15 U.S.C. § 15 (1982); *see Admiral Theatre Corp. v. Douglas Theatre Co.*, 585 F.2d 877 (8th Cir. 1978). Thus, WCCO's bald assertion that there is standing as a matter of law because an antitrust violation has occurred is simply not true on the facts of the pooling claim—*i.e.* Count I of the Complaint. Indeed, as a matter of law, there is *no* antitrust violation.

2. WCCO attacks the absence of any threatened injury finding by suggesting that the District Court and Court of Appeals looked only at the initial 1982 bidding whereas the pooling exists for twenty years.* Unfortunately, the failure of WCCO to make any proposal to purchase the pay TV rights of either the Twins or the North Stars since the demise of pay TV sports on Spectrum belies any threatened injury to WCCO. Further, WCCO's long-term analysis is negated by the various broadcast rights to Twins' and North Stars' games having been purchased by other entities such as OTA Channel 9 and 29 in the Twin Cities. The so-called pooling of resources is in reality moving the broadcast rights to various entities. Only the long-entrenched WCCO radio broadcast rights to Twins' games has remained stable with the signing of a new contract in 1985 between the Twins and WCCO.

3. The problem with WCCO's cursory remarks regarding threatened injury and the twenty-year term of Twin Star is that they fail to deal with why there is no threatened injury. The District Court observed:

> Unlike competitors who turn to the courts to block anticompetitive ventures before they locate in the market, WCCO challenges organizations actively broadcasting in this area.

Pet. App. A-42. Unlike *Monfort* where plaintiff sought to prevent a merger before it happened and the parties agreed to a combined trial on the merits/preliminary injunction hearing, the present case involves an economic reality.

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*The District Court held, and the Court of Appeals affirmed, that there was no threatened injury to WCCO from the teams' joint venture. Pet. App. A-42. The Court of Appeals also held that the failure of WCCO to request a special verdict question on threatened injury was dispositive. Pet. App. A-18.

Thus, while *Monfort* involves a case where an economic event, *i.e.* a merger, was *about to happen*, the present case involves an economic event, *i.e.* an operating joint venture, that *had happened*.

The jury found no actual injury had occurred to WCCO despite the operation of Twin Star. Pooling was a reality with the formation of Twin Star, the creation of Sports Channel, and the disposition of the pay TV broadcast rights of the two teams. If there was no injury at the point of the trial in 1983, it was quite likely, and the District Court correctly found, that WCCO could show no threatened injury in the future. Therefore, the finding of no threatened injury by the District Court, affirmed by the Court of Appeals, was appropriate based on the factual background. Essentially WCCO is asking this Court to review the case so that the consistent factual determinations of the two lower courts regarding threatened injury may be reversed. Certiorari is inappropriate in such circumstances.

4. The flimsiest analysis by WCCO in its petition is its assertion that if a violation is proved, standing exists. That is simply not true. Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 Yale Law Journal 809, 836-37 (1977) (standing doctrine is designed to narrow the broad class of injured persons to a subclass of plaintiffs who are deemed proper parties to sue). Standing by definition narrows the class of plaintiffs and excludes certain people from bringing antitrust claims, even though they may have been injured by an antitrust violation. Otherwise, the concept of standing would be without meaning because all violations would automatically confer standing on any plaintiff proving them.

5. With regard to the alleged tying violation, Count II of the Complaint, WCCO is simply not the correct party to bring the action. Proper tying plaintiffs are foreclosed competitors in the tied product market or purchasers of the tied product. *United States v. Loew's Inc.*, 371 U.S. 38, 44-45 (1962). The injury to the foreclosed competitors is that they are not permitted to compete in the tied product market. The injury to the purchasers of the tied product is that because of the market power in the tying product, a surcharge or premium is paid by the purchasers of the tied product in the tied product market. WCCO is not a member of either class of persons entitled to bring an antitrust tying claim.

6. WCCO describes itself as a customer (not a purchaser) and cites *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251 (1972), for the proposition that as a customer it has standing to sue for injunctive relief. Unlike the State of Hawaii, WCCO was not a customer. WCCO failed to purchase and thus was only a potential purchaser of the pay TV broadcast rights. This Court has never permitted a non-purchaser to assert a tying claim. Simply put, non-purchasers are not affected by the use of tying product market power in the tied product market.[7]

7. WCCO suggests that only it has a motive to sue for tying. The history of tying claims is replete with examples of foreclosed competitors in the tied product market and purchasers of the tied product suing for relief. If another

[7]It is almost nonsensical to deal legitimately with the tying claim of WCCO since the Court of Appeals found that, even if WCCO did have standing, its failure to identify the tied product and a tying product precluded any analysis of economic effect in those markets. Therefore, the Court of Appeals doubted whether WCCO presented a prima facie case for presentation to the jury. Pet. App. A-19.

professional sports team was prevented from selling its pay TV broadcast rights because of the alleged tying arrangement between the Twins and North Stars, it would have standing to sue as a foreclosed competitor. A purchaser of an allegedly tied product, in this case Spectrum, could sue because it paid too much for the package of products, *i.e.* Twins' and North Stars' pay TV rights.

WCCO argues that Spectrum would never sue as the victim of a tie because it wanted both the Twins' and North Stars' pay TV rights. That was a major point at trial; *both* Spectrum and WCCO wanted both teams. If a party wants to buy both the tying and tied products, there has been no tie. *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 25 (1984).[8]

8. WCCO argues that unsuccessful customers should be antitrust plaintiffs because: "[T]he Court of Appeals failed to understand this fundamental point. It in effect held that any unsuccessful customer desiring to purchase one of two tied products, but not the other, . . . would be left without a remedy." Pet. at 22. This passage demonstrates fatal flaws in the tying claim of WCCO.

First, it refers to both the Twins' and North Stars' pay TV rights as tied products. To have a tying claim there must be a tying product with market power and an economic effect in the tied product market. *Jefferson Parish*, 466 U.S. at 25. WCCO never identified a tying product or a tied product. Pet. App. A-19.

Second, WCCO misleads this Court by asserting that it

[8]In *Jefferson Parish*, the most recent tying decision of this Court, even though plaintiff identified the tied product the lower court record was criticized for failing to identify an effect in the tied product market. 466 U.S. at 29-30. Without a lower court record identifying the tying product or the tied product, Pet. App. A-19, it is impossible for this Court to analyze WCCO's tying claim.

desired to purchase only one of two allegedly tied products, but not the other. To make the argument WCCO misrepresented the facts to this Court by failing to reveal in its petition its bid for both Twins' and North Stars' pay TV rights. It was the concealment of that crucial fact by WCCO that was necessary to prevent this Court from understanding that WCCO wanted the pay TV rights for both the Twins and North Stars.

The tying claim, quite simply, had no merit from the start because WCCO was out-bid for the year-round pay TV sports programming product. Both WCCO and Spectrum bid for the combination of Twins' and North Stars' rights. To invite tampering with the bidding process for both teams by inviting antitrust actions by well-heeled losing bidders is to displace the workings of free markets, not to support them.

9. Finally, WCCO argues that it did not want to dismantle Spectrum, and that it merely objected to the bidding process. That simply, on the record, is not the case. WCCO sought not only to have tying prohibited between the Twins and North Stars; it also wanted Twin Star and Sports Channel dismantled. Pet. App. A-41, 46 (District Court denying WCCO's request for broad injunctive relief). WCCO's objection was not so much to the bidding process as to the existence of a new competitor in the marketplace.

III.

THIS CASE DOES NOT PRESENT FACTS APPROPRIATE TO DETERMINE THE QUESTION OF WHETHER POTENTIAL PURCHASERS MAY HAVE ANTITRUST STANDING TO RECOVER DAMAGES DUE TO AN UNLAWFUL TYING ARRANGEMENT

1. As discussed above, only foreclosed competitors in the tied product market and purchasers of the tied product have standing to sue for tying violations. WCCO's assertion of tying damages standing attempts to equate actual purchasers with potential purchasers under the rubric of customer. Since WCCO never purchased the allegedly tied product, in addition to never identifying it at trial, it was never injured by an unlawful tying agreement. WCCO was not frozen out of purchasing Twins' and North Stars' pay TV rights by a restrictive tying practice; someone else simply bought the property. The loss, if any, to WCCO was caused by the decision of another buyer to pay more than WCCO, or, as the Court of Appeals noted, WCCO's decision not to up its bid. Pet. App. A-8.

2. This Court in *Associated General Contractors* articulated six factors to be considered before enforcing a party's antitrust claim: (1) the causal connection between the alleged antitrust violation and the harm to plaintiff; (2) improper motive; (3) whether the injury was of a type that Congress sought to redress with the antitrust laws; (4) the directness between the injury and the market restraint; (5) the speculative nature of the damages; and (6) the risk of duplicate recoveries or complex damage apportionment. 459 U.S. at 537-44. The *Associated General Contractors* factors regarding antitrust standing support the long line of

cases before this Court that have limited antitrust standing for tying claims to actual purchasers or foreclosed competitors. *See generally Loew's*, 371 U.S. at 44-45.

3. The damages of an actual purchaser of a tied product are the excessive charge in the tied product market that would not have occurred except for the economic power in the tying product market. *See Kypta v. McDonald's Corp.*, 671 F.2d 1282, 1285 (11th Cir. 1982); *Heatransfer Corp v. Volkswagenwerk, A.G.*, 553 F.2d 964, 984-85 (5th Cir. 1977). Any damage calculation by WCCO based on a tying violation could not even approach such specificity.

WCCO's alleged damages for the tying claim is that it was denied the pay TV rights for the Twins' and North Stars' games, and, consequently it lost a business opportunity.[9] Even if WCCO lost the business opportunity of Twins' and North Stars' pay TV rights because of an antitrust tying violation, the damages are wholly speculative because WCCO is not in the class of persons for whom specific tying damage calculations can be made. Awarding WCCO damages for WCCO's loss of the business opportunity of Twins and North Stars pay TV rights, allegedly because of a tying violation, would merely be speculation concerning the level of profits, if any, that such a business opportunity would give to WCCO.

4. Even worse than the speculative nature of the damages for a lost fledgling business opportunity tangentially related to an alleged antitrust violation is the risk of dupli-

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[9]This damage calculation theory demonstrates that it is not antitrust injury being imposed on WCCO. Rather, it is that WCCO lost the business opportunity by being out-bid for the Twins' and North Stars' pay TV rights. The same economic effect to WCCO, i.e. no revenue or potential profits from pay TV rights of Twins and North Stars, would occur whenever another entity out-bids WCCO.

cate recoveries. WCCO alleges a lost business opportunity for the pay TV rights of the Twins and North Stars, but Movie Systems, Inc (the first bidder for North Stars' pay TV rights) also arguably suffered a lost business opportunity.

Any one of a multitude of "potential purchasers," *i.e.* potential users of the supply of Twins' and North Stars' pay TV rights, could come out of the woodwork to sue the Twins and Northstars for the same lost business opportunity. It is for that reason that tying violations limit damage recoveries to actual purchasers. Everyone who did not purchase the tied product is a potential purchaser and thereby entitled to damages under the global theory offered by WCCO. The risk of duplicate recovery, acknowledged to be a significant factor by this Court in *Associated General Contractors*, precludes the expansion of antitrust standing for tying damages to those other than actual purchasers.

IV.

THIS CASE GENERALLY IS NOT WORTHY OF THE EXERCISE OF THE DISCRETIONARY AUTHORITY OF THE COURT

1. A petitioner for a writ of certiorari has an obligation of presenting special and important reasons for the discretionary grant of this Court's review of the case. Supreme Court Rule 17.1. In opposition to a petition for certiorari, respondents are obligated to set forth any matter or ground why the cause should not be reviewed by the Court. Supreme Court Rule 22.1. Although not explicitly falling within the distinct categories of the three proposed certiorari questions presented by WCCO, the following gen-

eral information precludes this case from having the special importance required for discretionary review by this Court.

2. A significant part of this case is moot because of the settlement agreements entered into between the Twins and WCCO. Resp. App. A-13-14. The Court simply should not review a case that for the most part has been resolved by the parties.

3. This Court should not disregard the variety of problems the Court of Appeals found in the antitrust claims of WCCO in addition to the lack of standing. The three problems found by the Court of Appeals were: (1) no allegation of any claim of injury to competition in any defined, relevant product or geographic market; (2) the level of competition probably increased when Spectrum won the bid for the local pay TV rights of Twins' and North Stars' games; and (3) WCCO failed to identify a tied or tying product. Pet. App. A-18-19. The Court of Appeals concluded by stating that, "In short, we seriously doubt that WCCO made a sufficient tying case to warrant submission of this claim to the jury." Pet. App. A-19. Thus, any remand of this case to the Eighth Circuit based on any clarification of antitrust standing would be of little use to other cases because the Eighth Circuit has indicated its intent probably to dismiss this case on other grounds.

4. The flaws in the antitrust case of WCCO are a result of another distinguishing feature of this case: this case comes to the Court after a two-month trial rather than after a pretrial determination of standing by a district court. If the Court uses this case as a vehicle to clarify antitrust standing requirements, the case will be generally distinguished by the numerous facts developed at trial, including

but not limited to the specific antitrust defects pointed out by the Court of Appeals. Pet. App. A-19. Therefore, certiorari to clarify antitrust standing principles is not appropriate for this case.

5. The District Court noted that the products involved precluded an early determination of the standing issue. Pet. App. A-42 n.1 ("The unique nature of the market precluded an early resolution of the standing issue at trial."). This case is not one in which a manufacturer is selling hundreds or thousands of products over a period of time, each one tied to another product without regard to the buyer's preference. This case involves a single transaction where the teams, faced with a chance to make a package deal to a buyer who clearly wanted the whole package, wanted to test the market to see if the *legal* package deal with Spectrum was the best they could get. *Jefferson Parish,* 466 U.S. at 25; *see Northern v. McGraw-Edison Co.,* 542 F.2d 1336, 1345 (8th Cir. 1976), *cert. denied,* 429 U.S. 1097 (1977).

The classic tying cases involve multiple products tied over a period of time. *See International Business Machines Corp. v. United States,* 298 U.S. 131 (1936) (IBM machines tied to use of IBM cards). This case is different. It was the unique character of the product involved, *i.e.* television rights, that precluded an early standing decision by the District Court. It is that same uniqueness of the product involved that precludes this case from being of special importance or general applicability such that it is a desirable vehicle for the Court to clarify any problem that may exist in general antitrust standing requirements. Therefore, certiorari should not be granted.

CONCLUSION

For the reasons stated in this brief, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Midwest Communications, Inc.,

Plaintiff,

vs.

Minnesota Twins, Inc., Northstar Hockey Partnership, Twinstar Enterprises, a general partnership, Minnesota Subscription Television, Inc., d/b/a Spectrum, and Sports Channel, a Minnesota joint venture,

Defendants.

MEMORANDUM AND ORDER
Civ. 3-82-1729

Plaintiff moves for a preliminary injunction to preclude joint marketing by the defendants of the telecast rights to Minnesota Twins games and to prevent them from representing to other persons that they have put together a broadcast package including Twins telecast rights. Leon R. Goodrich, Esq. appeared for plaintiff. Peter Dorsey, Esq. appeared for the Minnesota Twins, Inc. Timothy D. Kelly, Esq. appeared for Northstar Hockey Partnership and Twinstar Enterprises. John M. Degnan, Esq. Appeared for Sports Channel and for Minnesota Subscription Television, Inc., d/b/a Spectrum.

I.

FACTUAL BACKGROUND

This suit arises out of the marketing of broadcast rights to certain games of the Minnesota Twins, a professional baseball team owned by defendant Minnesota Twins, Inc. ("Twins"), and the Minnesota North Stars professional hockey team, operated by defendant Northstar Hockey Hockey Partnership ("North Stars")[1].

Over three years ago, on January 11, 1980, the Twins entered a four-year agreement with Midwest Federal Savings and Loan Association ("Midwest Federal"), granting Midwest Federal radio broadcast rights to all Twins games and commercial over-the-air telecast rights to certain road and home games. *See* Affidavit of William S. Robertson. Exhibit A. Expecting pay television to break into the local market before the expiration of the 1989 agreement, Midwest Federal also purchased a "right of first refusal" to be triggered by an offer by a pay television broadcaster to telecast certain Twins home games during 1983 and 1984. The agreement states in relevant part:

> In the event that the Club receives from another person, firm or corporation a bona fide offer which it is willing to accept . . . for the right to broadcast League Games in the State of Minnesota, South Dakota, North Dakota, Wisconsin and/or Iowa during 1983 or 1984 by means of cable, closed circuit, pay or community antenna television, then the Club shall immediately give written notice thereof to the Company, including in said notice all of the terms and con-

[1]GBRSC, Inc. is a licensee of the Northstar Hockey Partnership for certain broadcast rights. GBRSC, Inc. and the Northstar Hockey Partnership will be referred to jointly here as the "North Stars".

> ditions of said offer including, but not limited to, the price, method of payment and description of the radio and television rights to be granted. The Company shall have ten (10) days after receipt of said written notice to elect to enter into an agreement with the Club for such broadcast and television rights on the same terms and conditions set forth in such notice.

Affidavit of William S. Robertson, Exhibit A, para. 23.

In 1981, the North Stars began investigating the local market for pay television of their home games, hoping to duplicate the success of other NHL teams. Believing that successful pay sports channels feature year-around programming, the North Stars spoke with Twins representatives about forming a partnership to provide year-around sports programming in Minneapolis-St. Paul and the surrounding region.

In July of 1982, Minnesota Subscription Television, Inc. (hereafter "Spectrum"), a subscription television company new to Minneapolis-St. Paul, presented a proposal to the Twins and North Stars to form a joint venture to market pay telecasts of both teams' home games. Shortly thereafter, plaintiff Midwest Communications, Inc. ("WCCO"), the owner of WCCO Radio and WCCO TV, met with the Twins and North Stars and stated that they were planning a cable sports network and wanted to make a proposal for pay telecast rights to Twins and North Stars games.

WCCO's proposal came in September of 1982. They "envision[ed] a full equity partnership among the Twins, North Stars, and the Upper Midwest's pre-eminent and most successful broadcaster—WCCO." Affidavit of William S. Robertson, Introduction in Exhibit B, Tab A, para. 3. All three participants would receive one-third of the revenues.

After comparing the two offers, the Twins and North Stars found the WCCO offer to be inferior. Mr. Karr, North Stars' president, recounts how he told WCCO that it could increase its offer to match the terms proposed by Spectrum. Affidavit of John F. Karr, para. 3(a). While the parties disagree over which package was truly most attractive to the Twins and North Stars, the two clubs opted for Spectrum. On September 22, 1982, a letter of intent was signed by the clubs and Spectrum, with notice of right-of-first refusal sent to Midwest Federal.

On October 1, 1982, Midwest Federal requested additional information from the Twins and an extension of the 10 day period within which Midwest Federal could exercise its right. The Twins granted the request, moving the due date to October 15, 1982.

On October 14, 1982, WCCO purportedly purchased an assignment of the right-of-first refusal from Midwest Federal. Their agreement includes the conveyance of Midwest Federal's "causes of action with respect to exercise of said right-of-first refusal." Complaint, para. 56. One day later, Midwest Federal notified the Twins of its election to make an offer pursuant to its right-of-first refusal. As with WCCO's earlier proposal, the Twins rejected this offer for the marketing of Twins telecasts by WCCO.

The decision of the two clubs to go with Spectrum spawned Twinstar Enterprises, a general partnership between the Twins and North Stars, formed to market broadcast rights to the two teams' games in the Upper Midwest. At the same time, Twinstar and Spectrum formed a partnership to telecast sports programming, called Sports Channel.

In its complaint, filed on December 3, 1982, WCCO claims that the distribution of the pay television rights to

Twins and North Stars games violated the federal and state antitrust laws and involved breach of contract as well as tortious conduct inducing the breach of contract and interfering with contractual relations. Twenty-seven days later, this Court heard and denied plaintiff's motion for a temporary restraining order, but provided plaintiffs with an expedited hearing date on this motion for a preliminary injunction.

II.

DISCUSSION

The standard to be applied by this Court in determining whether an injunction should issue was recently established in this circuit by *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109, 114 (8th Cir. 1981):

> [W]hether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.[2]

The Court recognizes that it cannot woodenly apply these factors. "At base, the question is whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined." *Id.* at 113.

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[2] 15 U.S.C. §26 (1982) adds that the movant for a preliminary injunction in an antitrust case must show that the danger of irreparable harm is "immediate".

A. *Threat of Harm to the Parties*

WCCO contends that it sues as an infant in the highly competitive pay television industry and that to allow Spectrum to continue to offer a tandam package of Twins and North Stars' home games on pay television will allow Spectrum to entrench itself in the local sports programming market, leaving it extremely difficult for WCCO to compete even if the Twins telecast rights are ultimately awarded to WCCO. While WCCO may suffer commercial injury, the threatened harm is not irreparable, nor does it outweigh the potential injury to the defendants.

First, WCCO argues that the threatened loss of its potential competitive position justifies the relief requested. This Court disagrees. While WCCO may lose potential market share, the remedy at law of damages is adequate. In the subscription television industry, more so than most, competitors are well aware of the identities of the cable operators, the number of households receiving subscription signals and even the demographics of the market. Prices are fairly standardized throughout the country. As a result, damages are quite capable of calculation.

But more importantly, the harm an injunction would inflict on defendants outweighs that imposed on WCCO. Sports Channel, the joint sports programming venture between Twinstar and Spectrum, has expended substantial capital to break into the local television market. All of Spectrum's nearly 6,000 Sports Channel sales have been on the representation that Twins games will be presented in 1983. Affidavit of John F. Karr, para. 17. An injunction could lead to loss of reputation and good will from which the newcomer could never recover.

WCCO retorts that it will suffer the greater loss of reputation and good will in the industry and with the viewing public because of a perceived inability to acquire rights to "major league" entertainment and the lost opportunity to build good will with pay television operators who contract with Spectrum instead. This Court doubts that denial of WCCO's motion would undermine the reputation and good will of one of this region's leading broadcasters. If an established broadcaster such as WCCO later obtains telecast rights to the Twins it could surely win back customers who turned to Spectrum for telecasts, particularly since those customers subscribe on a month-to-month basis. Pay television operators would be just as quick to switch to the established WCCO organization once it obtained telecast rights. On the other hand, if this Court blocked Spectrum's marketing strategy, its demise could be imminent.

The harm inflicted by an injunction, moreover, would tempoarily deprive the Twins of revenues generated by the marketing of its ball games. The Twins, unlike many professional franchises, stand in need of additional capital.

B. *Probability of Success on its Merits*

"The strength of this showing varies depending on the weight of the other three elements listed in *Dataphase* but absent some showing of probability of success an injunction will not issue." *Sperry Corp. v. City of Minneapolis*, 680 F.2d 1234, 1238 (8th Cir. 1982), *citing Dataphase*, 640 F.2d at 113. Since this Court concludes that the chance of irreparable injury to WCCO should relief be denied is outweighed by the likely injury to the other parties should the injunction be granted, WCCO faces a heavy burden of demonstrating that it is likely to prevail on the merits. *See*

Dataphase, 640 F.2d at 113. WCCO has not met this burden.

First, WCCO claims that the defendants formed a contract or combination in restraint of trade proscribed by federal and state antitrust law. It contends that the Twins and North Stars designed Twinstar to maximize revenues by restricting competition in the sale of telecast rights. Its position does not justify the relief requested. Before a combination constitutes an illegal restraint of trade, an agreement must be found between competitors. Horizontal restraints by definition require agreements between competitors. *See, e.g., Evans v. S.S. Kresge Co.*, 544 F.2d 1184, 1192 (3d Cir. 1976), *cert denied*, 433 U.S. 908 (1977). The Twins and North Stars, however, engage in different sports with different seasons.[3]

For that reason, plaintiff's reliance on *Board of Regents of the University of Oklahoma v. N.C.A.A.*, 1982-2 CCH Trade Cases ¶64,943 (W.D.Okla. 1982) and *United States v. Columbia Pictures Industries*, 507 F.Supp. 412 (S.D. N.Y. 1980), aff'd — F.2d —, (2d Cir. 4/7/81) (a do-not-publish order) is misplaced. In the *N.C.A.A.* case, member schools pooled broadcast rights for teams playing the same sport during the same season. Similarly, in *Columbia Pictures*, four motion picture producers combined to market films formerly in direct competition for the public eye. Here, even though the defendants freely admit they intended to increase revenue, the Twinstar concept evolved because the two clubs produced complementary, not competitive, products. *See* Affidavit of William S. Robertson at 16.

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[3]The two seasons of these two sports do overlap somewhat. The schedules show 78 days of overlap in five years; all the overlap is in the spring in years when the North Stars are in the playoffs. In 1978 and 1979, there was no overlap and in 1982 there was six days of overlap.

The Court does not assume that just because the Twins and North Stars play different sports, they are not in competition wth each other in the sale of their telecast rights. On the other hand, however, WCCO has not shown that the Twins and North Stars are substitute anchors competing to chain the same pay television audience to a particular channel.

WCCO also argues that the two clubs refused to separately sell the broadcast rights to their respective games. That is, any entity desiring to obtain the telecast rights to either the Twins or North Stars games must purchase the rights to both. This marketing strategy, WCCO contends, runs afoul of the Sherman Act's proscription against tying and constitutes dishonor of Midwest Federal's right-of-first refusal.

This Court agrees that the Twins could not be required to match the package offer by Spectrum. The record, however, is unclear as to whether WCCO had to include North Stars telecasts in its offer. On October 1, 1982, Midwest Federal inquired as to the terms and conditions under which the Twins would enter into an agreement to broadcast Twins games only. Affidavit of William S. Robertson, Exhibit E, p. 1. The Twins response, sent on October 5, 1982, contained the following language:

> The Twins recognize that any proposed agreement to be submitted by Midwest for the telecasts of the Twins games cannot, and is not required to, contain exactly the same terms and conditions as those contemplated by the Twins proposed partnership with the North Star Hockey Partnership (the "North Stars"), to be known as Twinstar Enterprises ("Twinstar"), or as those contemplated by the proposed joint

venture (referred to herein as "Sport Channel") to be formed by the Minnesota Subscription TV, Inc. ("Spectrum") and Twinstar, and that Midwest's offer may, in certain respects, differ.

At this time, the Court is not convinced that the Twins compelled Midwest Federal to tie North Stars' programming into its proposal, but they did require that WCCO's telecasts of Twins games be as attractive for the Twins as the returns under the Spectrum package. While WCCO may ultimately convince this Court that the Twins' actions constitute dishonor of its agreement with Midwest Federal, probability of success on this issue does not, by itself, justify injunctive relief.

C. *The Public Interest*

Plaintiff delayed in coming before this Court to challenge the means used by Spectrum to break into the area's pay television market. Over five thousand Sports Channel subscribers and two cable networks have already purchased the Spectrum package. To alter their expectations before these issues are adjudicated could well disrupt rather than preserve the status quo. Since Spectrum has obtained but a toehold in the broadcast market of this region, this Court finds the possible demise of Spectrum and the enhanced entrenchment of WCCO to be of legitimate concern and therefore, at this time, refuses to turn back WCCO's competition.

Furthermore, the Twins' fans must be considered. It is hardly to be in the public interest to deprive them of Twins pay television until this case is finally decided.

Based upon the foregoing, the record, the arguments and

briefs of counsel, IT IS HEREBY ORDERED that plaintiff's motion for a preliminary injunction is denied.

In order to minimize the possibility of commercial injury to WCCO, IT IS ALSO ORDERED that this case is to be ready for trial on or after April 25, 1983.

Dated: January 19, 1983.

/s/ ROBERT G. RENNER
United States District Judge

MIDWEST COMMUNICATIONS INC.
11th on the Mall
Minneapolis, MN
55403

JAMES M. RUPP
President &
Chief Operating Officer
(612) 330-2660

July 20, 1984

Mr. Carl R. Pohlad,
President
F&M Marquette National Bank
777 Marquette Avenue
Minneapolis, MN 55480

Dear Carl:

This will confirm what Tom Doar and I told you during our meeting the other day and again on the telephone this morning.

If you buy the Minnesota Twins, we will drop our claim for damages (not attorney fees and costs and not injunc-

tive relief) against the Twins (not the North Stars) that is included in the lawsuit presently on appeal to the Eighth Circuit.

With best regards,

/s/ James M. Rupp

JMR/j

cc: W. T. Doar, Jr.

CARL R. POHLAD
400 Marquette Hotel Building
710 Marquette Avenue
Minneapolis, MN 55402
(612) 339-8853

July 30, 1984

Mr. James M. Rupp
President
Midwest Communications, Inc.
11th On The Mall
Minneapolis, Minnesota 55403

Re: Minnesota Twins, Inc.

Dear Jim:

I thank you for you letter concerning the dropping of your claim for damages, but not attorneys' fees, costs or the claim for injunctive relief, against the Twins in the lawsuit presently on appeal to the Court of Appeals. We appreciate your good faith gesture as a part of the community support which has been given to enable the Twins to remain in Minnesota.

As we discussed a few days ago, the Twins could still be exposed to damages as a partner in the partnerships which are also defendants in the suit. You have indicated that in such eventuality your company would reimburse the Twins in the amount of damages (not attorneys' fees and costs) for which the Twins are responsible.

Please confirm our understanding by signing where indicated below.

With best regards,

Very truly yours,
/s/ Carl K. Pohlad

Agreed to this 30th day
of July, 1984.

MIDWEST COMMUNICATIONS, INC.
By /s/ James M. Rupp
James M. Rupp, President

CRP/ls